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IN THE
# Supreme Court of the United States
October Term, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
*Petitioner,*
v.
AMERICAN HOSPITAL ASSOCIATION, et al.,
*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

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## INTEREST OF AMICI CURIAE*

This case presents important issues concerning the rights of handicapped newborn infants to receive needed

*Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

medical treatment in the face of "private" choices and social pressures to withdraw such treatment for reasons of inconvenience, social cost or quality of life. The Rutherford Institute is opposed to the passive euthanasia of "inconvenient" young life and to the treatment of handicapped infants as chattel, without regard to constitutional rights of due process of law. The Rutherford Institute believes that the Congress, by enacting Section 504 and related provisions, evinced a clear intent to formulate a broad national policy to prohibit all discrimination against all handicapped persons in connection with any Federally funded programs and activities. This broad proscription includes discrimination in medical treatment decisions involving handicapped newborn infants receiving health services at Federally funded hospitals. The Rutherford Institute believes that the decision of the Court of Appeals should be rejected as inconsistent with the statutory language and legislative history of Section 504.

*Amici Curiae* are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to the protection and safeguarding of human life. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

## STATEMENT OF FACTS

*Amici curiae* adopt by reference the statement of facts as set forth in Petitioner's brief filed with this Court.

## SUMMARY OF ARGUMENT

On its face, Section 504 of the Rehabilitation Act of 1973 is a broad proscription against handicap discrimination under any Federal program or activity. Because the proscription goes beyond mere "exclusion from participation" or "denial of benefits" and extends to any handicapped person that is "subjected to discrimination," the plain language of the statute suggests that the Congress intended to reach any and all discrimination, not merely discrimination involving "access" to Federal programs. Moreover, it is clear that handicapped newborn infants are "otherwise qualified handicapped individuals" within the meaning of Section 504 when they (1) meet all relevant requirements, if any, to obtain natal or post natal medical treatment offered in connection with a Federal program or activity (*Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979)) and (2) are "excluded from participation" or "denied benefits" or "subjected to discrimination" under any such program or activity.

The legislative history of Section 504, from its enactment in 1973 through amendments in 1974 and 1978, indicates that the Congress intended to establish "a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." S. Rep. No. 1297, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390 [hereinafter "S. Rep. No. 1297"]. Moreover, as a matter of public policy, the Congress also clearly expressed its concern about "the denial of basic rights of individuals with handicaps" and with the need

to provide new mechanisms to insure "diagnosis, evaluation and treatment early in a child's life." *Id.* at 6406–6407. As this Court recently recognized, the 1974 amendments, expanding the scope of Section 504, clarified that those "charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination." *Alexander* v. *Choate*_U.S._(January 9, 1985), Slip Op. at 16, n. 24.

Finally, the legislative history is explicit that Section 504 was to have the same reach as Section 601 of the Civil Rights Act of 1964 and Section 901 of the Education Amendments of 1972. S. Rep. No. 1297 at 6390. These latter provisions have a broad reach, extending, for example, in the case of Section 601 of the Civil Rights Act of 1964, "to assure that hospitals financed by Federal money would not deny *adequate* care to Negroes." 110 Cong. Rec. 1519 (January 31, 1964) (emphasis supplied). Section 504 was intended to have the same broad sweep with respect to the handicapped.

## ARGUMENT

The question presented in this case, as in *United States* v. *University Hospital, State University of New York*, 729 F.2d 144, 150 (2nd Cir. 1984), is solely one of statutory construction, to wit: Did Congress intend for Section 504 of the Rehabilitation Act of 1973 to reach alleged discrimination in the treatment of handicapped newborn infants, solely because of their handicaps?

In attempting to discover the legislative intent, the lower courts have relied principally on the lack of any clear statement by the Congress that Section 504 would be used to monitor medical treatment of so-called "defective" newborns. *See id.* at 159-160; *American Acad-*

*emy of Pediatrics* v. *Heckler*, 561 F. Supp. 395 (D.D.C. 1983). This reliance is misplaced. As a matter of statutory interpretation, it is not necessary that the Congress consider or approve every conceivable application of a statute for it to be given its intended effect. Justice Holmes, in a decision written as Circuit Justice, described the error in the approach taken by the lower courts:

> A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is *not* an adequate discharge of duty for courts to say: We see what your are driving at, but you have not said it, and therefore we shall go on as before.

*Johnson* v. *United States*, 163 F. 30, 32 (1st Cir. 1908) (emphasis supplied). The proper rule of interpretation, to paraphrase Justice Holmes, is: We see what you are driving at, and what you have said, and we shall give it effect, absent any indication that it was not intended to have such an effect. *Cf. United States* v. *Bramblett*, 348 U.S. 503, 507 (1955), *cited* in *Huddleston* v. *United States*, 415 U.S. 814, 825 (1974) ("There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted.").

The analysis must begin with the language of the statute. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). It is also necessary to review the legislative history to discover and give effect to the legislative intent, for

> A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law.

*Smythe* v. *Fiske*, 23 Wall. 374, 380 (1874), *cited* in *Hawaii* v. *Mankichi*, 190 U.S. 197, 212 (1903).

### A. The Statutory Language.

Section 504 of the Rehabilitation Act of 1973 provides, in relevant part:

> No *otherwise qualified handicapped individual* in the United States, as defined in Section 706(7) of this title, *shall, solely by reason of his handicap,* be *excluded from* the *participation* in, be *denied* the *benefits* of, or be *subjected to discrimination under any program or activity* conducted by any Executive agency or by the United States Postal Service (emphasis supplied).

29 U.S.C. Section 794. Section 7(b) of the Act defines the term "handicapped individual" to mean:

> . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. Section 706(7)(B).

On its face, Section 504 broadly prohibits discrimination—whether by exclusion, denial of benefits or other

disparate treatment—under any Federal program or activity. The statutory language suggests that the Congress was concerned with more than simple "access" to Federal programs, because a ban on exclusion or denial of benefits would have remedied most, if not all, "access" discrimination. However, Congress went further to require that no handicapped individual shall be "subjected to discrimination" under any Federal program or activity, thereby expanding the plain reach of the statute to cover discrimination occurring in the day-to-day operations of Federally funded programs and activities.

The principal question as to the language of the statute centers on the term "otherwise qualified handicapped individual" and whether a handicapped newborn infant falls within this class of persons. The question is two-fold: Is a handicapped newborn infant a "handicapped individual" and, if so, is such an infant "otherwise qualified" within the meaning of the statute?

Despite the Second Circuit's painstaking analysis of the first part of this question in the *University Hospital* case, it properly concluded that "it would defy common sense to rule that she [Baby Jane Doe] is not presently *regarded* as handicapped under Section 706(7)(B)(iii)." 729 F.2d at 155 (emphasis in original). To dispel any doubt on this question, however (and, indeed, to ask why the Second Circuit even gave pause to this question), it is helpful to review the unequivocal language of the Senate Committee Report concerning the extended reach of Section 504 under the new statutory definition:

> The amended definition . . . takes cognizance of the fact that handicapped persons are discriminated against in a number of ways . . . .
>
> Clause [i] in the new definition . . . makes the definition applicable to the provision of

> Federally-assisted services and programs. Clause [ii] is intended to make clearer that the coverage of Section 503 and 504 extends to persons who have recovered—in whole or in part—from a handicapping condition, . . . but who may be discriminated against or otherwise be in need of the protection of Section 503 and 504.
>
> Clause [iii] in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority. *This subsection includes within the protection of Sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who are thus not technically within clause [i] in the new definition.* Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped.

S. Rep. No. 1297 at 6389–6390 (emphasis supplied). The definition of "handicapped individual" was thus intended to reach discrimination against *all* handicapped people as well as *all* who discriminate on the basis of handicap, whether or not a handicap actually exists.

The Second Circuit was also troubled as to whether a handicapped infant was an "otherwise qualified" handicapped individual, within the meaning of the statute.

Relying on this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979) (denial of admission to educational program) and the Second Circuit's decision *Doe* v. *New York University*, 666 F.2d 761 (2d Cir. 1981) (same), the *University Hospital* panel majority found that "otherwise qualified" had meaning only in the context of "static" programs or activities such as education, employment or transportation, and not in the comparatively "fluid" context of medical treatment decisions. 729 F.2d at 156. To hold otherwise, the majority concluded, would distort what the majority perceived to be the statute's "plain meaning":

> In common parlance, one would not ordinarily think of a newborn infant suffering from multiple birth defects as being "otherwise qualified" to have corrective surgery performed or to have a hospital initiate litigation seeking to override a decision against surgery by the infant's parents.

*Id.* This tortured interpretation is, at best, a "straw man" begging to be knocked down. The panel majority errs by focusing on the purported remedy to discrimination—i.e., corrective surgery or litigation to obtain it. However, the legislative history of Section 504 and this Court's decisions interpreting Section 504 make clear that the proper focus is on the requirements, if any, for infants to participate or receive benefits in the relevant Federal program or activity.

At the time Section 504 was drafted, it was aimed strictly at employment and vocational rehabilitation. See Part B *infra*. In that context, there were obvious eligibility requirements (independent of handicap) to participate in or receive benefits in connection with programs and activities related to employment or vocational rehabilitation. *Cf. Southeastern Community College* v.

*Davis*, 442 U.S. 397 (1979). The 1974 amendments, however, extended the reach of the Act beyond jobs and education to housing, transportation, health services and all other Federally aided programs. The term "otherwise qualified" in the context of these programs has less or no significance because there are few, if any, requirements to participate in or receive benefits other than the handicapping condition itself.

Unlike the situation presented in the *Davis* case, which involved the educational context, medical treatment for a newborn infant suffering from multiple birth defects, offered in conjunction with a Federal program, is not offered independent of the handicap, but rather is offered solely *because of the handicap*. Since the Congress obviously intended to prohibit handicap discrimination in the provision of health services, it would be incongruous to *impose* artificial requirements to qualify for such services when such an interpretation would emasculate the statute. It would likewise be nonsensical to hold that the statute does not apply to handicapped newborn infants because of the *absence* of particular qualifications for treatment independent of the handicap.*

---

*In *United States* v. *Baylor University Medical Center*, 736 F. 2d 1039 (5th Cir. 1984), the United States Court of Appeals for the Fifth Circuit held that receipt of Medicaid and Medicare payments constituted "federal financial assistance" for purposes of Section 504 and that Section 504 was violated when a hospital refused to allow a deaf patient to bring an interpreter into the hospital to understand her pre- and post-operative discussions with the medical staff. Under the reasoning of the *University Hospital* panel majority, however, the hospital would not be in violation of Section 504 if it simply refused to treat any condition of the woman which was related to her handicapping condition (i.e., deafness). Section 504 is a flimsy right, indeed, if, once a deaf person or handicapped infant walks through the hospital door, they can be denied the very treatment which would allow them to fully function as citizens, merely because Section 504 allegedly does not apply to "medical treatment" decisions relating to their handicap.

It is more reasonable to conclude that Congress intended for the meaning of "otherwise qualified" to depend on the context of the Federal program or activity involved. "Otherwise qualified" handicapped individuals are thus handicapped individuals (i) who are able to meet all of the requirements, *if any*, for participation in any program or activity which is funded by the Federal government, in spite of their handicap (*Southeastern Community College* v. *Davis*, 442 U.S. at 406), and (ii) who are "excluded from participation," or "denied benefits" or "subjected to discrimination" under any such program or activity. Accordingly, handicapped newborn infants who receive medical treatment in connection with any Federal programs or activities are "otherwise qualified," provided that the hospital generally offers treatment of the type required by the infant. Likewise, the failure to exercise *bona fide* medical judgment in the administration of a program or activity involving infants qualified to receive Federally funded natal and post-natal care constitutes unlawful discrimination under Section 504.

### B. The Legislative History.

Despite the clarity of the statutory language, it is necessary to review the legislative history of the statute to determine the legislative intent. In this regard,

> [i]t has never been questioned in this Court that Committee reports, as well as statements by those in charge of a bill or of a report, are authoritative elucidations of the scope of a measure.

*Schwegmann Brothers* v. *Calvert Distillers Corporation*, 341 U.S. 384, 399–400 (1951) (Frankfurter, J. dissenting). It is also helpful to "analyze the policies underlying the statutory provision to determine its proper scope." *Rose*

v. *Lindy*, 455 U.S. 509, 517 (1982). In this case, the relevant legislative history includes not only Section 504's genesis in 1973, but also its evolution by amendment in 1974 and 1978.

*The Rehabilitation Act of 1973*. The Rehabilitation Act of 1973 was enacted on September 26, 1973, to implement comprehensive changes in Federal-state vocational rehabilitation programs and was intended to replace the existing Vocational Rehabilitation Act. S. Rep. No. 1297 at 6376. The 1973 Act was aimed principally at employment of the handicapped as well as assisting the handicapped to function in society. S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076 [hereinafter "S. Rep. No. 318"]. Senator Dole, a co-sponsor of the Senate version of the Rehabilitation Act, discussed the general goals of the Act:

> The primary goal of this bill is to assist handicapped individuals in achieving their full potential for participation in our society. . . . I believe this bill will work to the real benefit of America's disabled. This bill contains the State plan requirements, the individualized written programs, strong emphasis on research and training, and antidiscrimination provisions.

119 Cong. Rec. 24589 (Daily ed. July 18, 1973). Because the President vetoed two previous bills, the Act was, in effect, a negotiated agreement between the Congress and the Administration. S. Rep. No. 318 at 2077–2078. An interagency and congressional dialogue on implementation of the new law immediately followed the bill's enactment. It soon became clear that "certain clarifying and perfecting changes would be required in order to permit the full implementation of Congressional intent." *Id.* at 6376–6377. As was acknowledged in *Consolidated*

*Rail Corp.* v. *Darrone*,_U.S._(February 28, 1984), Slip Op. at 7,

> [E]nhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether Section 504 was intended to prohibit other types of discrimination as well.

*The 1974 Amendments*. Amendments were prepared and passed by both houses of the Congress in 1974. The amendments were vetoed by President Ford, but the veto was overridden. S. Rep. No. 1297 at 6373–6374. This Court has recognized that the 1974 "amendments and their history . . . shed significant light on the intent with which Section 504 was enacted." *Alexander* v. *Choate*,_U.S._(January 9, 1985), Slip Op. at 18–19 n. 27.

The amendments substantially expanded the scope of the law relating to the handicapped, including Section 504:

> (1) Section 7(b) added a new definition of "handicapped individual" which affected numerous provisions of existing law, including Section 504, and extended the overall reach of the anti-discrimination statute beyond employment and vocational concerns;
>
> (2) Section 101(a)(6) provided for affirmative action for the handicapped by state agencies and facilities receiving Federal vocational aid; and
>
> (3) Section 101(a)(9)(c) provided for detailed record keeping with reference to such affirmative action.

S. Rep. No. 1297 at 6375. The amendments also authorized continuing appropriations for handicap programs, restructured administrative agencies for more effective implementation of handicap programs, provided for grants and special projects for special demonstration programs, and called for a White House Conference on Handicapped Individuals, with a clear mandate for investigation and study. *Id.* at 6374–6376.

Whereas in 1973 Section 504 applied only to handicapped individuals in the context of employment or vocational rehabilitation, the new definition of "handicapped individual" in 1974 greatly expanded the reach of Section 504 to include, in the words of the Senate Committee report, "*all* handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, *health services*, or any other Federally-aided programs." *Id.* at 6388 (emphasis supplied). The committee report further elaborated that:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin) and Section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). *The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.*

*Id.* at 6390 (emphasis supplied). This legislative history is unequivocal and without reservation. Section 504 was intended to reach *all* handicapped people who participate in, receive benefits from or are discriminated against in

connection with Federal programs or activities and *all* who discriminate against such persons. *Cf. Atascadero State Hospital* v. *Scanlon*,_U.S._(June 25, 1985) (Brennan, J., dissenting).

The legislative history of the 1974 amendments is also important to the present inquiry for the public policy declared therein by the Congress. Contemporaneous declarations of public policy are useful aids in determining the meaning of a statute.

> It is well settled that, in interpreting a statute, the Court will not look merely to a particular clause in which general words may be used, but will take in connection with it *the whole statute* . . . and the objects and policy of the law . . . .

*Brown* v. *Duchesne*, 19 How. 183, 194 (1857) (emphasis supplied), *cited* in *Stafford* v. *Briggs*, 444 U.S. 535 (1980); *Rose* v. *Lundy*, 455 U.S. 509, 517-518 (1982).

The 1974 Senate Committee Report declared that "now more than ever a concerted and in depth examination must be made of all aspects of law and public policy which affect individuals with handicaps." S. Rep. No. 1297 at 6401. To this end, a call was issued for a White House Conference on Handicapped Individuals to identify problems and solutions for the handicapped. In doing so, the Senate Committee proceeded to make several declarations about the need to clarify and reformulate public policies relating to the handicapped. The Committee Report stated:

> Too often we automatically make the assumption that nothing can be done. With that assumption made, even the best programming and the most advanced services cannot meet their goals. *It is against the basic tenets of the scientific process to make an assumption of no hope and no help. No less should be true of public policy. In the case of individuals with handicaps, mak-*

> *ing this assumption all too often has resulted in the violation of their basic rights as human beings*, and has condemned them to live useless lives. *Foresight and a strong commitment to the worth and dignity of the human life could have allowed them to live their lives with respect and dignity as first class citizens.*

*Id.* at 6400-6401 (emphasis supplied).

The Committee also directed the Conference:

> . . . to address itself directly to the problem posed by the denial of the basic rights of individuals with handicaps. In examining this area, the Committee expects that the Conference will identify those areas where civil rights have been denied and will make explicit recommendations for change.

*Id.* at 6406-6407. It further recognized the need for diagnosis, evaluation and treatment of handicaps early in a child's life.

> *Diagnosis, evaluation, and treatment early in a child's life could enable many children with handicaps to blunt the effects of these disabilities.* The Committee urges local governments, States, and the White House Conference to review and explore *new mechanisms to insure that these important early life measures are provided for all children.*

*Id.*

Far from a concern limited to "access" issues, the Congress was urging and embarking upon a broad attack on *all* barriers to the handicapped, *including health service and medical treatment decisions*. Moreover, it expressly affirmed providing treatment to *all handicapped children* early in life. It is, therefore, a glaring

misstatement and a denial of the Congressional will to say that "the legislative history . . . focuses on discrimination against *adults and older children* and denial of access to federal programs." *United States* v. *University Hospital, State University of New York*, 729 F. 2d at 158, *citing American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. at 401 (emphasis supplied).

In truth, the 1974 amendments greatly expanded the reach of Federal law to protect all handicapped persons from all kinds of discrimination. At the same time, Congress was urging a new sensitivity and commitment to the needs and problems of the handicapped, as well as examination and revision of public policy dealing with such problems. It was thus wholly consistent with the legislative intent for then Secretary of Health, Education and Welfare Joseph Califano to declare in a communication to the Congress that a "new era of civil rights in America" had begun with the 1974 amendments. *See* Hearings Before the Subcommittee on Select Education of the Committee on Education and Labor of the House of Representatives, 95th Cong. 1st Sess. 76. In short, as this Court stated recently:

> [The] 1974 Amendments to the Act clarified the scope of Section 504 by *making clear that those charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination.*

*Alexander* v. *Choate*,_U.S._(January 9, 1985), Slip Op. at 16, n. 24 (emphasis supplied).

*The 1978 Amendments*. In 1977, Congress held hearings on the implementation of Section 504 and enacted amendments in 1978. The amendments made Section 504

applicable to the Executive Branch and the U.S. Postal Service and provided for regulations necessary to implement other provisions of the 1978 amendments. In discussing the conference report on the 1978 amendments, Representative Jeffords stated:

> Finally, under section 504 . . . . the conference accepted a provision which I authored which I think brings fairness and equity to the entire picture in eliminating discrimination against the handicapped wherever it exists. In September 1977, the Justice Department issued an opinion at the request of the Department of Health, Education, and Welfare, declaring that the Federal Government was exempt from section 504. Somehow it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves. So I developed a provision which is in this conference report that extends coverage of section 504 to include any function or activity in every department or agency of the Federal Government.

124 Cong. Rec. 38551 (October 14, 1978).

The amendments also enhanced remedial powers for violations of Section 504. 29 U.S.C. Section 794a was enacted to provide as follows:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, [42 U.S.C. Section 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

An additional provision of the 1978 amendments made an award of attorney's fees available to prevailing parties in actions brought to enforce Section 504. Thus, Congress once again incorporated by reference the broad provisions of the Title VI of the Civil Rights Act of 1964 to expand the remedies available to enforce Section 504. *Cf. United States* v. *Weber*,_U.S._(March 20, 1984), Slip Op. at 10.

### C. The Congressional Analogy to Section 601 of the Civil Rights Act of 1964.

Because the Congress specifically intended that the reach and scope of Section 504 be identical to Section 601 of the Civil Rights Act of 1964 (now 42 U.S.C. 2000d), it is useful to review briefly the scope of that section. Section 601 bans discrimination on the ground of race, color or national origin in any program or activity receiving Federal financial assistance. The regulations promulgated thereunder, like the regulations in this case, provide, among other things, that Federal aid recipients may not:

> (i) provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> (ii) restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program; or
>
> (iii) discriminate in the availability or use of any academic . . . or other facilities of the grantee or other recipient.

40 C.F.R. Section 80.3(b)(1) and 80.5(b).

In *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court

interpreted Section 601 and the regulations described above to require the San Francisco school system to provide English language instruction to 1,800 non-English speaking Chinese students on grounds that *the failure to provide such instruction* denied them a meaningful opportunity to participate in the public educational program based solely on their race. Moreover, in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1977), each of the three opinions of the Court acknowledged that the purpose of Section 601 was to provide the Executive Branch with the authority and the obligation to terminate financial support to any private or governmental activity which discriminated on the basis of race. *See id.* at 285, 336 and 413. Thus, both the regulations promulgated under Section 601 and the application of Section 601 to discrimination against individuals and groups, including the failure to provide equal opportunity under governmental programs, are far reaching and reflect an uncompromising policy to eradicate racial discrimination under any Federal program or activity.

The significance of the Congressional analogy to Section 601 was eloquently expressed by Judge Winter in dissent in the *University Hospital* case:

> The government has never taken the position that it is entitled to override a medical judgment. Its position rather is that it is entitled under Section 504 to inquire whether a judgment in question is a *bona fide* medical judgment. While the majority professes uncertainty as to what this means, application of the analogy to race (as in Section 601 cases) eliminates all doubt. A judgment not to perform certain surgery because a person is black is not a *bona fide* medical judgment. So too, a decision not to correct a life-threatening digestive problem be-

> cause an infant has Down's Syndrome is not a *bona fide* medical judgment.

729 F.2d at 162. That Section 601 of the Civil Rights Act of 1964 would reach this far is absolutely clear from its legislative history. Its principal sponsor in the House, Representative Emmanuel Celler, stated:

> The bill would offer assurance that hospitals financed by Federal money *would not deny adequate care to Negroes* . . . . It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds.

110 Cong. Rec. 1519 (January 31, 1964) (emphasis supplied).

In other words, Section 601 is a broad mandate against discrimination on account of race in connection with any Federal program. It has been construed liberally, as the Congress intended. Section 504, should likewise be given a broad reach and scope, as the Congress intended. *Alexander* v. *Choate*_U.S._(January 9, 1985), Slip Op. at 16, n. 24.

### D. The Congressional Analogy to Section 901 of the Education Amendments of 1972.

The Congress also analogized Section 504 to Section 901 of the Education Amendments of 1972, now 20 U.S.C. 1681. Section 901 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that [specified exceptions omitted] . . . .

In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979),

this Court identified the primary congressional purpose behind Section 901 to be "to avoid the use of federal resources to support discriminatory practices." *Id.* at 704. It also stated that this purpose "is general'y served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices." *Id.* Likewise, in *North Haven Board of Education* v. *Bell* 456 U.S. 512, 521 (1982), this Court "recognized the need to accord [Title IX] a sweep as broad as its language." *Grove City College* v. *Bell*,_ U.S._(February 28, 1984), Slip Op. at 8. In *Grove City*, this Court also made clear that:

> Title IX was patterned after Title VI of the Civil Rights Act of 1964. The drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage, and, *since they approved identical language, we discern no reason to believe that the Congressmen who voted for Title IX intended a different result* [citations omitted].

*Id.* at 10. It is difficult to discern how Section 504 of the Rehabilitation Act, which Congress intended as a broad weapon against discrimination based on handicap, should not be given the same expansive coverage as Section 901 which Congress viewed as a far reaching weapon against sex discrimination in education.

## CONCLUSION

In its response to the Department of Health and Human Service's proposed rules that are the subject of this case, the American Medical Association argued, in part, that deference should be made to parental judgment in the treatment of seriously deformed newborns:

> The presumption is that the love which parents usually have for their children will be dominant

> in the decisions which they make in determining what is in the best interest of their children. It is to be expected that parents will act unselfishly, particularly where life itself is at stake. Unless there is convincing evidence to the contrary, parental authority should be respected.

49 F.R. No. 8 at 1629 (January 12, 1984). While these assumptions and conclusions are basically sound, we cannot readily assume, as a matter of social policy, that every parent will act unselfishly or will be able to withstand the new and severe emotional pressures of being the parent of a handicapped newborn infant. Likewise, not all physicians or medical professionals will advise that ordinary medical treatment be provided for such infants. In such instances, it is not inappropriate or unreasonable for the Department to establish minimally intrusive protective and investigational measures and to require that "the long-standing requirements and mechanisms of state law for defining the limits of parental authority not be rendered, through discriminatory actions of recipient hospitals, *de facto* inoperative." *Id.* at 1631.

Surely, it would be a perversion of the Congressional intent for the protection afforded by Section 504 to be withheld from handicapped newborn infants. The statutory language is broad and far reaching and without exception. The legislative history likewise evinces a strong intent for broad application to all handicapped individuals, in a manner consistent with Section 601 of the Civil Rights Act of 1964 and Section 901 of the Education Amendments of 1972. Furthermore, there is no indication that the Congress intended that the full protection of Section 504 stop upon admission to the hospital or apply only at some indeterminate time after

birth. In the absence of Congressional expression to the contrary, the courts should give Section 504 its intended broad effect.

Justice Douglas quite properly stated that "when the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the Council of Revision which was rejected by the Constitutional Convention." *Flast* v. *Cohen*, 392 U.S. 83, 107 (1968); *cf. Saia* v. *New York*, 334 U.S. 558, 571 (1948) (Jackson, J. dissenting) ("But I did not suppose our function was that of a council of revision."). Unfortunately, in this case, the lower courts have disregarded the clear Congressional intent for broad and unrestricted application of Section 504. Not unlike a Council of Revision, they have transgressed the express legislative will and substituted their own social policy views. This mistake in judgment by the lower courts should not be permitted to stand in tne place of otherwise valid legislation.

"[The] only check upon our own exercise of power," Justice Stone once wrote concerning this Court, "is our own sense of self-restraint." *United States* v. *Butler*, 297 U.S. 1, 79 (1936). It is appropriate that self-restraint be exercised in this case by reversal of the lower court decision.

Respectfully submitted,

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